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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1012

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation, dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GEORGE DEUKMEJIAN
Attorney General of the
State of California

GEORGE J. ROTH
Deputy Attorney General

555 Capitol Mall, No. 350
Sacramento, CA 95814
Telephone: (916) 445-6221

Attorneys for Petitioner

TABLE OF CONTENTS

Page

I

THE STATE'S PRIMARY INTEREST IN THIS CASE IS TO PRESERVE ITS CONSTITUTIONALITY GRANTED RIGHTS UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF LIQUOR AND THE STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM WITHIN ITS BORDERS---------- 1

II

THE IMPORTER DESIGNATION STATUTE UNDER CONSIDERATION IS FULLY WITHIN THE DIRECT LANGUAGE AND MEANING OF CALIFORNIA CONSTITUTION, ARTICLE XX, SECTION 22-------- 5

III

THIS COURT, NOT THE STATE COURT, IS THE ULTIMATE INTERPRETOR OF FEDERAL CONSTITUTIONAL ISSUES------- 8

CONCLUSION---------- 11

TABLE OF AUTHORITIES

Page

California Liquor Dealers v. Midcal Aluminum, Inc. (Midcal) 445 U.S. 97 (1980) ----------2,3,4,12

State of Minnesota v. Clover Leaf Creamery Company (Clover Leaf) ___U.S.___ (No. 79-1171 Jan. 21, 1981 (49 L.W. 4111) ------8,10

STATUTE

FEDERAL:

15 U.S.C. § 1 (Sherman Act)--------5,12

CONSTITUTIONS

FEDERAL:

United States Constitution Twenty-first Amendment ----------Passim

STATE:

California Constitution Article XX, section 22----------5,11

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I

THE STATE'S PRIMARY INTEREST IN THIS CASE IS TO PRESERVE ITS CONSTITUTIONALLY GRANTED RIGHTS UNDER THE TWENTY-FIRST AMENDMENT TO CONTROL THE IMPORTATION OF LIQUOR AND THE STRUCTURE OF THE LIQUOR DISTRIBUTION SYSTEM WITHIN ITS BORDERS

In an attempt to ward off the granting of certiorari in this case, respondents proffer the claims that the Attorney General does not truly represent the interests of the State and that the commitment of petitioner, the Director of Alcoholic Beverage Control, to the statute under consideration is dubious at best. (Respondent's Brief, p. 3, fn. 3.) Each of respondents' claims is false; they have no place in this case and should be ignored. Respondents have totally ignored the State's petition and pointedly addressed all their arguments only to the briefs filed by the two intervenors.

Obviously, respondents are trying to make the Court believe that the same situation exists here which occurred in California Liquor Dealers v. Midcal Aluminum, Inc. (Midcal), 445 U.S. 97 (1980), where only the Attorney General, as amicus, and not the Director, in any capacity, participated in briefing and argument before the Court. (See Midcal, fn. 12 at p. 111.)

Here, of course, unlike Midcal, the Director is the petitioner for certiorari; the Attorney General is his counsel. Both have participated from the inception of the case in the Court of Appeal, through the Petition for Hearing in the California Supreme Court, and now in this Court. Respondents have attempted to lower the case to the level of an inter-industry fight to divert attention from their true position, one where they, as disgruntled parties, are hoping to ultimately prevent the operation of a carefully considered and duly enacted statute.

The Attorney General and the Director of Alcoholic Beverage Control of the State of California, along with the Directors of similar departments in at least ten other states including Arizona, Colorado, Indiana, Kentucky, Nebraska, New Mexico, New York, North Carolina, North Dakota, and South Carolina, who have jointly filed an amicus curiae brief herein, are all extremely concerned that if the opinion of the California Court of Appeal is not overturned by this Court,

it will be the first stone in an avalanche of litigation which will completely destroy the liquor laws and regulations of every state in the union. That this is no idle fear is evidenced by the list of cases now pending which appears in footnote 2 of the other states' Amicus Brief at page 14. In this connection, it is exceptionally significant that one of the participating amici states is North Carolina, ". . . ' a control state,' wherein the state completely controls and operates the distribution and sale of liquor. . . ." (Other states' Amicus Brief, p. 2.)

Respondents' arguments highlight the problem which has resulted from their misinterpretation of Midcal. They refuse to recognize the plenary power granted to the states by the Twenty-first Amendment and confirmed by this Court (Respondent's Brief, p. 3). Rather, they claim that the Twenty-first Amendment only gives the states the right to determine whether they should be wet or dry (Respondent's Brief, p. 19.)

If the Court of Appeal's basic premise regarding the inter-relationship between the Sherman Act 1/ and the Twenty-first Amendment is accepted, the ineluctable conclusion is that if any liquor statute affects price; or restrains trade, no matter how remotely; or is perceived by a court to violate the "policy" behind the Sherman Act; then the state regulatory enactment is invalid. Under such an analysis every state liquor regulation would be in jeopardy. That cannot be the law.

II

THE IMPORTER DESIGNATION STATUTE UNDER CONSIDERATION IS FULLY WITHIN THE DIRECT LANGUAGE AND MEANING OF CALIFORNIA CONSTITUTION, ARTICLE XX, SECTION 22

Respondents, by only giving this Court a partial quote from the first sentence of California Constitution article XX, section 22, attempt to create the illusion that the California Constitution expressly acknowledges total federal

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1. 15 United States Code section 1.

preemption in the area of liquor control. They make the amazing argument that if California has any rights under the Twenty-first Amendment, "it has specifically waived this right in its own Constitution" (Respondent's Brief, p. 18).

The entire sentence reads:

> "The State of California, subject to the internal revenue laws of the United States, shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State, and subject to the laws of the United States regulating commerce between foreign nations and among the states shall have the exclusive right and power to regulate the importation into and exportation from the State, of

alcoholic beverages."

As becomes immediately obvious, the omitted first half of the sentence necessarily applies to the structure of the liquor distribution system, one of the basic issues in this case.

Assuming, arguendo, that the second part of the sentence, quoted by respondent, was inserted into the constitutional initiative by the California voters in order to immediately give back to the federal government anything which was given to the State by the Twenty-first Amendment, the argument is answered by the self-evident proposition that "the laws of the United States" are as interpreted by the pronouncements of this Court. Thus, not only is respondents' position not supported by the literal language of the California Constitution referred to by them; it likewise is not supported by the cases in this Court.

III

THIS COURT, NOT THE STATE COURT, IS THE ULTIMATE INTERPRETOR OF FEDERAL CONSTITUTIONAL ISSUES

Respondents argue that this Court should deny certiorari because the California Court of Appeal has declared state legislation invalid (Respondents' Brief, 3, fn. 3). Such a position is contrary to this Court's recent holding in State of Minnesota v. Clover Leaf Creamery Company (Clover Leaf), ___ U.S. ___ (No. 79-1171 Jan. 21, 1981 (49 L.W. 4111)).

In the instant case the Court of Appeal erroneously adopted the position that because the statute under consideration did not "clearly vindicate" State interests it could be set aside, particularly since there were various other existent ". . . provisions designed to insure that each legitimate state interest is fully recognized." (Appen. to Ptn. for Cert., p. 30.) In contrast, this Court has pointed out in Clover Leaf that:

". . . States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker'." (Citations omitted; 49 L.W. at p. 4113.)

". . . we reiterate that 'it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.' [Citation.] Since in view of the evidence before the legislature, the question clearly is 'at least debatable,' [citation] the Minnesota Supreme Court erred in

substituting its judgment for that of the legislature." (49 L.W. at p. 4115.)

* * * *

CONCLUSION

Respondents have not met their burden in opposition to the Petition for Writ of Certiorari filed by the California Director of Alcoholic Beverage Control and the State Attorney General as his counsel. Their attempted minimization of the State's active participation in the case is not only contradicted by the record but is highlighted by the Amicus Curiae Brief in support of the petition filed by the liquor administrators of ten other states. Respondents' major point, that a part of a sentence in California Constitution article XX, section 22, has given back to the federal government full preemption in the area of liquor control, evanesces when the entire sentence respondents neglected to quote is read in full. Their contention, that the determination of the federal issues which that State Court of Appeal erroneously interpreted are strictly matters within the province of the local state courts, is totally countered by this Court's recent opinion in the Clover Leaf case. The other points they

raise have previously been fully answered by the briefs of petitioner, the intervenors, and other amici.

The Petition for Certiorari should be granted by this Court to stem the avalanche of litigation which is now arising because of misinterpretation of the Midcal case; to preserve the plenary power over liquor importation and structure of the liquor distribution system granted to the states by the Twenty-first Amendment; and to clarify the law relating to per se violations of the Sherman Act.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California

GEORGE J. ROTH
Deputy Attorney General

By _____
GEORGE J. ROTH
Deputy Attorney General

Attorneys for Petitioner
Baxter Rice, Director of the
California Department of
Alcoholic Beverage Control

GJR/lac

STATE OF CALIFORNIA)
COUNTY OF SACRAMENTO) ss.

AFFIDAVIT OF SERVICE BY MAIL

Mary Lynn Hook, being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 555 Capitol Mall, Suite 350, Sacramento, California 95814; that on the 11th day of March, 1981, affiant enclosed three true copies of the within PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States mail at the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid; that there is delivery service United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

WILLIAM T. CHIDLAW, ESQ.
POINT WEST EXECUTIVE CENTRE
1455 RESPONSE ROAD, SUITE 191
SACRAMENTO, CA 95815

MICHAEL J. MALONEY, ESQ.
BALL, HUNT, HART, BROWN & BAERWITZ
455 SO. FIGUEROA ST.
LOS ANGELES, CA 90071

WYMAN, BAUTZER, ROTHMAN & KUCHEL
FRANK ROTHMAN
CHRISTINA A. SNYDER
TWO CENTURY PLAZA, 14TH FLOOR
2049 CENTURY PARK EAST
LOS ANGELES, CA 90067

FELDMAN, WALKMAN & KLINE
GEORGE G. WEICKHARDT
27TH FLOOR, RUSS BLDG.
235 MONTGOMERY ST.
SAN FRANCISCO, CA 94104

WILFRIED J. KRAMER, CLERK
COURT OF APPEAL
THIRD APPELLATE DISTRICT
LIBRARY & COURTS BLDG.
SACRAMENTO, CA 95814

MacDONALD FLINN
EDNA R. SUSSMAN
WHITE & CASE
14 WALL ST.
NEW YORK, N.Y. 10005

MORTON SIEGEL
SIEGEL, DENBERG, VANASCO, SHUKOVSKY,
MOSES & SCHOENSTADT, LTD.
189 W. MADISON ST., SUITE 1000
CHICAGO, ILLINOIS 60602

All parties required to be served have been served.

Mary Lynn Hook

Mary Lynn Hook, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 11th day of March, 1981.

Janet E Chapp

NOTARY PUBLIC in and for the County of Sacramento, State of California.